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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-679

CLIFFORD EDWIN WYATT,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

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Member of the Bar
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TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW Clifford Edwin Wyatt, by his attorney, Roger S. Hanson, Esq., a member of the Bar of the United States Supreme Court, and petitions this

Honorable Court for a Writ of Certiorari directed to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, to review that certain unpublished decision, People v. Wyatt, rendered June 15, 1976, affirming appellant's conviction of a violation of California Health and Safety Code § 11911.[1/]

Pursuant to Rule 23, Rules of the Supreme Court of the United States, Petitioner Wyatt submits the following:

(A)

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, rendered June 15, 1976 is unpublished. A copy of said opinion is affixed to this petition as Appendix A.

Another opinion dealing with the facts of the instant case, People v. Frank J. Mardian, 47 Cal.App.3d 16 (1975),

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1/ Effective October 1, 1973, Health and Safety Code § 11911 was amended and renumbered 11378.

which affirmed the conviction of co-defendant Mardian, and upon which certain issues in the instant petition turn, is published in the official reports of the State of California.

(B)

JURISDICTION

The ground upon which the jurisdiction of this Honorable Court is invoked are:

(i) the date that judgment which is sought to be reviewed was entered is June 15, 1976;

(ii) A petition for rehearing was made and denied on July 8, 1976 by the Court of Appeal, Fourth Appellate District. The Supreme Court of California denied a Petition for Hearing on August 18, 1976 and all state remedies have been exhausted.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. § 1257 (3) which provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Jurisdiction of this Honorable Court is further invoked because the California Court of Appeal, Fourth Appellate District, Division Two, has decided at least two federal questions in a way not in accord with applicable decisions of this Honorable Court. In Re Winship, 397 U.S. 358, 364; Mullaney v. Wilbur, 421 U.S. 684.

(1) The California Court of Appeal has further decided a Federal issue

appearing in this case, contrary to the Fifth and Fourteenth Amendment to the United States Constitution where proper application of the pertinent State Statute would have required a directed verdict of acquittal as to petitioner, and where the error promulgated by the trial court allowed jeopardy to remain alive against petitioner; had the trial court properly decided the motion timely made under California Penal Code §§ 1111 and 1118.1, petitioner would have been acquitted and a subsequent attempt to "reopen" the case against petitioner would have violated the Fifth and Fourteenth Amendments to the Constitution of the United States.

(2) Contrary to the mandates of In Re Winship, 397 U.S. 358, 364, and Mullaney v. Wilbur, 421 U.S. 684, the California Court of Appeal has affirmed the conviction of petitioner where the state failed to prove one of the essential facts necessary under California law to sustain a conviction, corroboration of accomplice testimony.

Under California law, a conviction cannot be obtained on the uncorroborated testimony of an accomplice. An accomplice is defined as someone liable to be prosecuted for the exact same crime for which the defendant is then being tried for. California Penal Code §§ 1111, 1118.1.

Petitioner developes these two issues infra in this petition for Writ of Certiorari.

(C)

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's right under the Fifth and Fourteenth Amendments to the United States Constitution were violated by the trial court wilfully refusing to grant petitioner's motion for a directed verdict of acquittal at the close of the prosecution's case pursuant to the mandatory provisions of California Penal Code §§ 1111 and 1118.1 where it is now conceded that:

(a) At the close of the prosecution's case, the prosecution had

failed to corroborate accomplice testimony and appropriate defense motions were made pursuant to California Penal Code §§ 1111 and 1118.1;

(b) These mandatory motions were denied by the trial judge and that denial was judicial error;

(c) Had the motion been properly granted, the case would have been dismissed because of the resulting judgment of acquittal;

(d) Because the motion was wrongly denied, and solely because the motion was wrongly denied, one day later the prosecutor was able to and was allowed to produce a witness who is now, according to California Court of Appeal, erroneously said to "corroborate" the accomplice testimony, but who in fact does not corroborate the charged crime, but instead described a totally different crime occurring in a totally different city several weeks before the date of the charged crime;

(e) Had the motion been properly granted and the judgment of acquittal had properly been entered, it would have been a violation of the Fifth and Fourteenth Amendments to allow a reopening of the case one day later?

2. Whether petitioner's rights under the Fourteenth Amendment, as interpreted by In Re Winship, 397 U.S. 358, 364, requiring that the prosecution carry the burden to prove beyond a reasonable doubt each fact necessary to achieve a conviction, were abrogated by the California Courts allowing and affirming that accomplice testimony requiring corroboration was achieved by a non-accomplice witness testifying to an alleged totally different crime committed by petitioner in a different city some several weeks earlier to the crime for which petitioner was being tried?

3. Whether the trial court's error in refusing to grant the motion made under California Penal Code §§ 1111 and 1118.1 at the close of the prosecution's

case, now conceded to be error was harmless under Chapman v. California, 386 U.S. 18, 24 and Fahy v. Connecticut, 375 U.S. 85?

(D)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

AMENDMENT V - CAPITOL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(E)

CALIFORNIA STATE STATUTES INVOLVED

California Penal Code § 1111:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence, as shall

tend to connect the defendant with the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

California Penal Code § 1118.1:

"In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution

is not granted, the defendant may offer evidence without first having reserved that right."

(F)

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner Wyatt and a co-defendant, Frank Joseph Mardian, Jr., were charged with, tried for and convicted of possession for sale and possession, respectively, of a controlled substance called "P.C.P." which was cached at a specific home in Glen Avon, California on the specific date of January 26, 1973.

That home belonged to one Dixie Hanson Hardesty, one of the sisters of appellant-petitioner, Wyatt, who was keeping the substance knowing that it was contraband.

Dixie Hardesty was ruled to be an accomplice as a matter of law within the meaning of Penal Code § 1111.

Kenneth Donahue testified for the prosecution that he, petitioner Wyatt,

and Frank Mardian had been involved in the sales of "P.C.P." and that he, Donahue, had been to the Hardesty home in Glen Avon.

Kenneth Donahue was ruled to be an accomplice as a matter of law within the meaning of Penal Code § 1111.

Following completion of the People's case, the defendant Wyatt and Mardian moved for a judgment of not guilty under Penal Code § 1111 for failure of the People to corroborate accomplice testimony.

That motion was erroneously denied, for today it is conceded that the People had not corroborated accomplice testimony as to petitioner Wyatt when the motion was validly made and denied. On the other hand, it is conceded, and the Court of Appeal so found that the requisite corroboration was adduced as to Frank Mardian. See People v. Mardian, 47 Cal.App.3d 16, 42 ff.

At 47 Cal.App.3d 16, 43, the Court of Appeal in deciding the separate and previously taken appeal of Frank Mardian,

Jr., ruled that one Connie Bockleman, a 14 year old baby sitter, provided corroboration to the conviction of Mardian by seeing Mardian remove from the Glen Avon home an open box ostensibly containing a white substance similar to the white P.C.P. found at that home on January 26, 1973; importantly, the said Connie Bockleman had never seen petitioner Wyatt at the home, and hence could not provide corroboration as to Wyatt.

At page 44 of 47 Cal.App.3d 16, the Court of Appeal erroneously states that one Debra Donahue the ex-wife of Kenneth Donahue had testified that petitioner Wyatt, Ken Donahue and Frank Mardian "had in her presence discussed sales of P.C.P., which was stored at the Hardesty house . . ." and that said testimony provided the requisite corroboration as to Mardian.

It is important to realize that the foregoing is a false statement for Debra Donahue:

1. Did not know what house was being discussed, but it was at

someone's sister's home in Riverside; (Note Bene: the contraband here involved was located in a totally different city, Glen Avon!!!).

2. Did not hear that P.C.P. was then being discussed;

3. Heard this alleged conversation at least 30 days prior to the date of January 26, 1973, i.e. "around Christmas time, 1971", or "maybe anytime from October to December, 1972."

Note Bene: Infra, we set out the exact testimony herein involved.

Importantly then, at the conclusion of the People's case, when the Penal Code § 1111 and Penal Code § 1118.1 motions were made, the People had not corroborated the accomplices as to Clifford Wyatt.

The Court erroneously failed to follow the mandatory requirements[2/] of

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2/ Penal Code § 1111: A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by (Continued)

Penal Code §§ 1111 and 1118.1, i.e., that he shall grant the motion when the motion was made properly under Penal Code § 1111.

The defense then rested, terminating the case.

2/ Continued:
such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. Penal Code § 1118.1: In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offense charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right. (1967 ch 256, section 3) Cal. Jur. 2d Tr. Sections 455, 525.

Expecting to merely return for arguments and jury instructions the next day, defense counsel then were confronted on that next day with a "motion to reopen" on the part of the prosecution to present the testimony of Debra Donahue. It appeared that the Prosecutor realized that he had, indeed, failed to corroborate accomplices as to petitioner Wyatt, and after hearing defense arguments at the Penal Code §§ 1111-1118.1 motion, the prosecutor then sought to "reopen".

That motion was granted, and Debra Donahue testified as we have correctly set forth below, and as erroneously set forth at 47 Cal.App.3d 16, 44 and erroneously repeated in the slip opinion, paragraph 1, page 9 and Section II page 12 in the instant appeal.

Importantly, this error was called to the attention of the Fourth Appellate District Court of Appeal on two separate occasions:

(a) At oral argument before that Court on June 2, 1976; and

(b) At a petition for rehearing.

Each of these clearly provable factual assertions were ignored by the Court of Appeal and the opinion was not corrected as to its erroneous facts.

Raised in this Petition for Certiorari are two significant Federal Constitutional issues concerning apparently hitherto undecided Federal Constitutional questions in California:

I (1) Where §§ 1111 and 1118.1 of the California Penal Code provide for a mandatory dismissal at the conclusion of the People's case, and

(2) Where it is now recognized that the People had failed to corroborate accomplices at the announced conclusion of the People's case, and

(3) Where a valid motion under Penal Code § 1111 - Penal Code § 1118.1 was made by petitioner Wyatt's attorney that everyone now concedes should have been granted, and

(4) Where the defense apparently educated the prosecutor that the People had not corroborated accomplices as to petitioner Wyatt, then is it a denial of due process of law under either:

(a) The double jeopardy clause of the Fifth Amendment to the United States Constitution, or

(b) The command of Penal Code § 1111 and Penal Code § 1118.1 and People v. Valerio, 13 Cal.App.3d 912, 919-921,

to allow the prosecution to "reopen" their case to allegedly "corroborate" their accomplice testimony?

II Can the prosecution "corroborate" that accomplice testimony offered by them to prove the isolated crime of possession for sale/ possession of P.C.P. at a private residence in Glen Avon,

California on January 26, 1973 by presenting evidence that petitioner Wyatt had discussed "dope" being at someone's sister's home in a totally different California City, Riverside, California, at a time some 30 days previous to the date charged in the information, namely, January 26, 1973?

We assert these issues to be issues of first impression in California, because as far as our research has shown this Honorable Court has never addressed itself to I, supra, and while many, many cases have been decided interpreting California Penal Code § 1111, none of them have allowed "corroboration" of a distinct certain isolated criminal charge by testimony (a) of a totally different crime; (b) in a totally different city; (c) occurring some 30 days before the crime charged.

We pray that a certiorari be granted to resolve these issues of first impression in California.

(G)

REASONS FOR GRANTING PETITION FOR A WRIT OF CERTIORARI

1. To resolve the statewide and Federal Constitutional issue of first impression whether a California trial judge can wilfully refuse to grant a motion validly and timely and appropriately made under California Penal Code §§ 1111 and 1118.1 for a directed defense verdict of acquittal as to petitioner Clifford Wyatt at the close of the prosecution's case where, in fact, the prosecution had indeed failed to corroborate accomplices, following full oral argument by both defense and prosecution, and then, on the following court day, when a request for continuance by the prosecutor had not been made to present further testimony, allow the prosecution to "reopen" their case to attempt to "corroborate" accomplices?

2. To resolve an apparent issue of first impression whether the prosecution can "corroborate" accomplice evidence of the commission of a specific crime of possession of contraband P.C.P. located

at a specific private home in Glen Avon, California, on a specific date, by evidence of a "conversation" overheard between petitioner and a co-defendant and an accomplice concerning "dope" being located at another home in another city, Riverside, said conversation occurring some 30 days previous to the date of the charged crime on January 26, 1973, where said "dope" was supposedly located at the home of someone's sister in the different city of Riverside around Christmas, 1972?

3. Whether, when a valid motion is made under Penal Code § 1111 and Penal Code § 1118.1 at the close of the prosecutor's case for failure to corroborate accomplices, which if correctly decided would have ended the case as to petitioner, Clifford Edwin Wyatt, disenabling the prosecution from ever retrying Wyatt or "reopening" the case against him, is petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution violated by the trial judge thereafter allowing the prosecutor to "reopen" its case, where

the sole impetus for the reopening had been the defense's argument to the Court correctly calling attention to the constitutional defect in the People's failure to corroborate accomplice testimony?

4. Whether the corroboration of the accomplice testimony must be by facts which establish a connection of the defendant to the charged crime beyond a reasonable doubt within the meaning of In Re Winship, 397 U.S. 358, 364 and Mullaney v. Wilbur, 421 U.S. 684?

(H)

ARGUMENT

I IN AN ISSUE OF STATEWIDE IMPORTANCE, AND OF FIRST IMPRESSION AS IS KNOWN, THE CONSTITUTIONALITY UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS RAISED BY THE TRIAL COURT REFUSING TO HONOR THE MANDATORY REQUIREMENT TO GRANT A DEFENSE VERDICT OF ACQUITTAL AND DISMISSAL UNDER PENAL CODES 1111-1118.1, FOR FAILURE TO CORROBORATE ACCOMPLICE TESTIMONY, WHERE HAD SAID MOTION BEEN GRANTED, THE CASE WOULD HAVE ENDED, AND WHERE, UPON A FOLLOWING COURT DAY, THE COURT ALLOWED THE PEOPLE TO "REOPEN" TO ATTEMPT TO CORROBORATE ACCOMPLICES

We have set forth above in our summary of the facts of this case that petitioner was charged with a very specific isolated charge:

(a) the possession of phencyclidine hydrochloride (P.C.P.), a controlled substance;

(b) At a home in the City of Glen Avon, California;

(c) On January 26, 1973.

No allegations of a continuing conspiracy was asserted, and the date of January 26, 1973 was the sole date in question.

The People linked petitioner Wyatt to that contraband at that location at that time by Dixie Hanson Hardesty, the owner of the premises, who was one of the sisters of petitioner Wyatt, and who admitted under oath that the foregoing contraband was cached at her home with her permission knowing it to be contraband.

She was labelled an accomplice as a matter of law to the charges against petitioner.

Kenneth Donahue also linked petitioner to the charge by overtly admitting to his activity with petitioner in the sales of P.C.P. Donahue was labelled an accomplice as a matter of law to the possession of the P.C.P. at the Glen Avon, California home on January 26, 1973.

Other witnesses produced by the prosecution could not and did in no way link petitioner Wyatt to the possession of the

P.C.P. at Glen Avon, California, at that home on January 26, 1973.

Solely through Dixie Hanson Hardesty and others quoting her was it established that Dixie was one of petitioner Wyatt's sisters.

At the close of the prosecution's case, the only sole link of petitioner Wyatt to the P.C.P. in the home in Glen Avon, California, on January 26, 1973, was provided by two persons who were accomplices as a matter of law.

Consequently, a motion pursuant to Penal Code 1111 and Penal Code 1118.1 was made by the defense at the end of the prosecution's case.

It is now conceded by all persons, prosecution and defense, as well as the trial judge, that the said motion should have been granted as to petitioner Wyatt.

It was, however, erroneously denied although the motion is compelled to be granted per Penal Code 1111.

Had it been correctly granted, the case would have ended in acquittal as to

petitioner Wyatt. The Fifth and Fourteenth Amendments to the United States Constitution would have forbidden retrial of petitioner or the haling back of petitioner before the same jury for any further jeopardy proceedings.

Following extensive argument, and erroneous denial of that motion, the defense opened and rested.

On a subsequent day, the trial judge allowed the prosecutor to reopen his case, he being then educated as to its severe and fatal constitutional deficiency of having failed to corroborate his accomplices.

He then produced one Debra Donahue, an ex-wife of accomplice Kenneth Donahue, who testified tersely and briefly and significantly different in key areas from the narration set forth in People v. Mardian, 47 Cal.App.3d 16, 30, 44 and as repeated in the instant slip opinion at pages A-11, A-12, first full paragraph and page A-15, section II.

A reading of these two opinions conveys the false and erroneous impression

that at sometime much precedent to January 26, 1973, Debra overheard a conversation between Wyatt, Mardian and her husband concerning "dope" stored at Cliff Wyatt's sister's home in Glen Avon. In fact, Debra Donahue was unable to tell whose "sister" was involved (i.e. whether it was Wyatt's sister, or Ken Donahue's sister, or Frank Mardian's sister.)

In fact, P.C.P. was not then the subject of discussion. In fact, the subjection of discussion concerned an unknown home in the totally different city of Riverside, California.

The full and actual conversation follows:

From R.T.A. 400 ff:

"Q: (By Mr. Cox, the D.A.) Were you present at any meetings between Mr. Wyatt and Mr. Donahue?"

A. Yes.

Q. (By Mr. Cox) Did you overhear any conversation between them?

A. Bits.

Q. Did you hear any conversations around the time of Christmas of 1972?

A. Yes. Around that time.

Q. Were these conversations related to Riverside?

A. Yes.

Q. What was the conversation?

A. I have heard Cliff and Frank talk to Ken about different types of dope and that kind -- . . . and they had to go to Riverside to get something . . . They had to go to Riverside to get it and Cliff would send Frank to get it. . .

Q. Was there any comment made where in Riverside?

A. At his sister's. I don't know where in Riverside. At his sister's."

NOTA BENE: This conversation was allued to have occurred at widely varying times by Mrs. Donahue and alludes to an unknown location in Riverside at an unknown sister of someone not specified by Mrs. Donahue. Moreover, it deals with a date at the most proximate time to

January 26, 1973, of "a little bit after Christmas, but not very much after." (R.T.A. 402, lines 15-20).

On other occasions, Mrs. Donahue was even more distant, viz:

a. "Around Christmas, 1972" (R.T.A. 400, lines 11-17).

b. "Sometime around Christmas, 1972" (R.T.A. 400, lines 11-17).

c. No specific recollection at a particular time or date; no specific conversation in January, 1973 (R.T.A. 403, lines 4-8).

d. No conversation <u>after</u> Christmas, 1972 (R.T.A. 403, lines 14-17).

e. No specific recollection even if it was December, 1972; I would say about from October <u>to</u> December."

Most importantly, the term P.C.P. was not used in this conversation (R.T.A. 404, line 3).

Upon redirect from prosecutor Cox, Debra Donahue admitted that "I can't

really remember . . . anything that I heard after Christmas, 1972."

Hence, we take exception to the erroneous language found in the opinion <u>People v. Mardian</u>, 47 Cal.App.3d 16, 44 viz:

> "In addition, Debra Donahue's testimony to the effect that her ex-husband, Wyatt, and the defendant (Mardian) had in her presence discussed sales of P.C.P., <u>which was stored at the Hardesty house</u>, and which the defendant was to pick up, provides further independent evidence which could reasonably satisfy the jury that the accomplices were telling the truth. This testimony was likewise sufficiently corroborative to satisfy Penal Code 1111."

It is <u>absolutely false</u> that Debra Donahue stated that she heard a discussion of "sales of P.C.P. <u>which was stored at the Hardesty house</u>," for the above quoted testimony of Debra Donahue deals with a location in Riverside and it is

manifest that the illegal compound was located in the home of the Hardesty's in Glen Avon, California, a wholly different city than Riverside. Moreover, it was at least a month earlier and it was located at the home of someone's sister, which Mrs. Debra Donahue failed to define, stating she did not know where in Riverside it was located in December, 1972.

We simply bespeak of asking for intellectual accuracy on this key point, for accuracy provides absence of corroboration while inaccuracy allows the Court to state the "corroboration" did occur. We challenge anyone to cite line and page where the record shows that Debra Donahue said she heard discussions of P.C.P. sales which compound was then stored at the Hardesty home, which is manifestly in Glen Avon, California. Again, Mrs. Donahue allued to a home in Riverside, California at a time fully 30 days earlier.

Intellectual and factual accuracy is a must in the reporting of facts in a legal opinion affecting the lives and

future of any California citizen.

The Court of Appeals recognizes in its opinion of June 15, 1976, (Appendix "A"), that the Hardesty home, i.e., the place where the P.C.P. was found was in Glen Avon, California, and we note the following:

(1.) (Page A-3, 11th line from top

"Mrs. Bockleman then told the deputy that her daughter, Connie, while babysitting at the Hardesty residence in Glen Avon the preceding day . . ."

(2.) (Page A-3, first full paragraph:

"Following his interview with Mrs. Bockelman, Deputy Driscoll (accompanied by Detective Ludtke,) went to the Hardesty residence in Glen Avon to talk with Connie Bockleman.

(3.) (Page A-4, line 1, of the first full paragraph)

"Armed with the information furnished by the Bocklemans, Deputy Driscol filled out an Affidavit for the issuance of a search warrant for the

Glen Avon residence."

(4.) (Page A-4, bottom 2 lines)

"Immediately upon securing the warrant, Driscoll accompanied by Detective Frank Andrews, proceeded to the Hardesty Residence in Glen Avon."

(5.) (Page A-6, lines 10-11)

". . . to her Glen Avon Residence."

The Court of Appeals at pages A-11,12 slip opinion, People v. Wyatt, first full paragraph, notes that the discussion was in fact over a Riverside location, but the Court erroneously states that it was to be obtained at (defendant Wyatt's) sister's house, because Mrs. Donahue overtly did not know where it was located nor did she define whose "sister" was involved.

It must be emphasized that no one but accomplices or persons quoting them established a brother-sister relationship between Dixie and Wyatt, and it was never established whose sister was involved during that conversation at least a

month prior to the date in question, January 26, 1973.

In general, the burden is on the prosecution to provide the requisite corroboration of accomplices. It is a fact necessary under California law to sustain the conviction because of the inherent unreliability of accomplice testimony. People v. Tewksbury, 15 Cal.3d 953, 967.

The United States Supreme Court has said in In Re Winship, 397 U.S. 358, 364:

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Thus, at the conclusion of the prosecution's case when the motion was made, the court had no choice but to grant the motion. The word "shall" in that

statute is mandatory.

"The word shall has traditionally been interpreted as a mandatory direction in a statute." United States v. Machado, 306 F.Supp. 995, 997 (N.D. Calif. 1969). In Re Thrift Shoe Co. Inc. 502 F.2d 1211, 1213 (9th Cir. 1974) interpreting § 9402(i) of the California Commercial Code.

Thus, had the court acted correctly, jeopardy would have ended, and having once attached, petitioner could never be returned to jeopardy.

Why, if the trial court errs, and the error, now recognized to favor the prosecution, would have ended the case but for its occurrence, should not this Honorable Court now correct that error and now direct a verdict of acquittal?

This raises to a Fifth and Fourteenth Amendment Due Process issue under the United States Constitution.

Statewide authority in California is sparse on the subject but it appears that the rationale for Penal Code 1111 is to

terminate the trial and the jeopardy at the earliest opportunity when it becomes evident that the case presented is legally inadequate, i.e., at the first valid time that the motion is made. In People v. Valerio, 13 Cal.App.3d 912, 919-921, the Fourth Appellate District said:

> "Under section 1118.1 the court 'shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading of such offense or offenses on appeal.' (2) The test to be applied by the trial court under the section is, therefore, the same test applied by an appellate court in reviewing a conviction: whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged (People v. Groom, 60 Cal.2d 694, 696-697, 36 Cal.Rptr. 327, 388 P.2d 359; People v.

Redrick, 55 Cal.2d 282, 10 Cal.Rptr. 823, 359 P.2d 255.)

We shall be called upon hereinafter to deal more specifically with the elements of the two offenses charged. It is apparent, however, that if the testimony of the woman codefendant may be considered, there was ample evidence to support a conviction of defendant for both possession and transportation of marijuana. (3) We are met at the outset, therefore, with the question whether, in reviewing this alleged error and its possible prejudicial effect, we must confine ourselves to the evidence before the trial court at the time the prosecution rested or whether we may consider the evidence thereafter presented.

Although defendant's motion was actually presented and argued after all of the evidence was

in, it was previously reserved and by permission of the trial court was deemed made at the close of the prosecution's case. It would appear reasonable, therefore, to relate the denial of the motion back to that time also. Penal Code, Section 1118.1 providing for a motion for acquittal was enacted by the Legislature in 1967 replacing former section 1118 which provided for a nonbinding directed verdict. The new enactment is substantially similar to subdivision (a) of rule 29 of the Federal Rules of Criminal Procedure. Under the federal practice, the majority of decisions hold that, if after the motion is denied, the defendant puts on evidence which supplies any deficiency in the prosecution's case, he may not complain on appeal of the erroneous denial of his motion. (Cephus v. United States, 324 F.2d 893, 896;

see also 8 Moore's Federal Practice, 2d ed. pp. 29.03 and 29.05). In so holding, the cases generally theorize that the defendant 'waived' the error or is estopped to assert it or, in some cases, that the error cannot be considered prejudicial. (See 8 Moore's Federal Practice, supra; Phillips, comment, the motion for Acquittal: A Neglected Safeguard, 70 Yale L.J. 1151, 1160-1163). The 'waiver' rationale has been severly criticized (see Cephus v. United States, supra, 324 F.2d at pp. 896-897; but see 8 Moore's Federal Practice, supra, p. 29.05, test opposite fns. 16 through 18), and the California decisions under the directed verdict procedure prior to 1967, while not controlling, appear inconclusive and somewhat in conflict (see People v. Clark, 72 Cal.2d 870 881; 44 Cal.Rptr.

784, 402 P.2d 856; but cf. People v. Coleman, 100 Cal. App.2d 797, 803; 224 P.2d 837; People v. Crane, 34 Cal.App. 760, 762-765, 168 P.1055).

Whatever may be the appropriate rule generally, the case at bench presents a fact situation in relation to this problem substantially the same as that in Cephus v. United States, supra, 324 F.2d 893. The testimony helpful to the prosecution which came in after the denial of the motion (remembering that the motion was deemed made and is deemed denied at the conclusion of the prosecution's case) was given by the woman codefendant. Defendant's testimony did not materially assist the prosecution's case against him. The thrust of his testimony was that the codefendant alone was guilty in contradiction of the codefendant's testimony to the effect that defendant was guilty. The

court in Cephus concluded that, under such circumstances, it could not be held that the defendant was estopped or that he had waived the allegedly erroneous denial of his motion. We are persuaded that, in this precise fact situation, the rule of Cephus is correct and that we should review the denial of defendant's motion for acquittal on the basis of the evidence as it existed at the close of the prosecution's case.

The error of the trial court in not terminating jeopardy is a Federal Constitutional error under the Fifth Amendment to the United States Constitution and must be measured by the Harmless Error Rules of Chapman v. California, 386 U.S. 18, 24 and Fahy v. Connecticut, 375 U.S. 85, i.e., the beneficiary of the error must be able to demonstrate that the error in no way contributed to the conviction. Obviously, since jeopardy would have ended except for the error, and jeopardy continued because

of the trial court's error, this cannot be demonstrated by the People, and the conviction must be reversed.

Certiorari should be accorded on this significant hitherto unresolved Fifth and Fourteenth Amendment issue.

II THE USE OF DEBRA DONAHUE TO CORROBORATE" THE POSSESSION OF THE SPECIFIC COMPOUND, P.C.P. AT A SPECIFIC HOME IN A SPECIFIC CITY, GLEN AVON, CALIFORNIA, ON A SPECIFIC DATE, JANUARY 26, 1973, BY TESTIMONY OF HER OVERHEARING A CONVERSATION "SOMETIME DURING OCTOBER THROUGH DECEMBER, 1972" CONCERNING "DOPE" BEING AT AN UNKNOWN HOME IN A DIFFERENT CITY, RIVERSIDE, CALIFORNIA, FAILS TO COMPLY WITH PENAL CODE 1111 IN THAT IT FAILS TO LINK PETITIONER TO THE CRIME THAT HE WAS CHARGED WITH COMMITTING; AS SUCH THE PEOPLE HAVE NOT ESTABLISHED EACH FACT NECESSARY TO CONVICT WITHIN THE MEANING OF IN RE WINSHIP, 397 U.S. 358, 364, AND MULLANEY V. WILBUR, 421 U.S. 684.

In People v. Carole Ann Gavin, 21 Cal.App.3d 408, 419-421, authority is once again developed that supports the general proposition that in California, "on or about" in a charged crime means usually a day before a day after; it can not be elasticized to include a few weeks before or a few weeks after the date in question. The Second Appellate District Court of Appeals said in Gavin at 419:

"In the case at bench the problem

was not one of election, because the People's evidence precisely established the time of the alleged offenses within two hours, at the end of one calendar day and the beginning of another. The evidence suggesting a distinct offense arose in the testimony of the defendant which was intended as exculpatory but which after cross-examination, would have supported a finding of a felony distinct from those charged. The manner in which the problem arose in this case is different from that in the cited cases, but the prejudice is no less here where the jury indicated it was willing to consider the convicting the defendant for the uncharged offense.

The decision in People v. Wrigley (1968), 69 Cal.2d 149, 155, 70 Cal.Rptr. 116, 443 P.2d 580, deals with a related, but different, problem, and cannot be

read as casting any doubt upon the Castro-Williams line of cases. In Wrigley, the charge was one count of lewd acts upon the body of an 11 year old girl 'during the month of June, 1965'. The testimony of the victim showed lewd touchings on two occasions, but she was vague about calendar dates. Defendant denied having done anything of the kind, and attempted to prove an alibi. His contention on appeal was stated in the opinion of the Supreme Court at page 155: 'Defendant contends that it was error for the court not to have limited the time which the jury could have found the offense to have occurred to the period which the prosecution selected as the time of the commission thereof, namely May or June of 1965.'

The court held that where prosecution evidence did not point to a particular day or hour, to the

exclusion of any other time, it was proper to tell the jury it might find the defendant guilty if it found he had committed the offense 'at any time within the time covered by the evidence.' The giving of the 'on or about' instruction in that case was approved. The problem there considered was that the uncertainty of the prosecutrix as to calendar dates handicapped defendant in the presentation of an alibi defense. There was no contention that defendant was in danger of being convicted of an uncharged offense, or that part of the jury might think one offense proved and part think a different offense proved. The Castro-Williams situation was not before the court, and those cases were not discussed.

The judgment is reversed. The attempted appeal from the order is dismissed."

It must be kept in mind that petitioner was charged with:

(1.) possession of phencyclidene, a specific compound

(2.) "on or about" the specific date of January 26, 1973

(3.) at the specific location of a certain home in the city of Glen Avon, California.

In violation of the "on or about" rule of People v. Gavin, 21 Cal.App.3d 408, the trial court allowed the prosecutor to attempt to corroborate this specific crime by an alleged conversation overheard by one Debra Donahue which is set forth verbatim below:

"From R.T.A. 400 ff:

Q: (By Mr. Cox, the D.A.) Were you present at any meetings between Mr. Wyatt and Mr. Donahue?

A: Yes.

Q: (By Mr. Cox) Did you overhear any conversation between them?

A: Bits.

Q: Did you hear any conversation around the time of Christmas of 1972?

A: Yes. Around that time.

Q: Were these conversations related to Riverside?

A: Yes.

Q: What was the conversation?

A: I have heard Cliff and Frank talk to Ken about different types of dope and that kind .... and they had to go to Riverside to get something . . . They had to go to Riverside to get it and Cliff would send Frank to get it . . .

Q: Was there any comment made where in Riverside?

A: At his sister's. I don't know where in Riverside. At his sister's."

NOTA BENE: This conversation was alluded to have occurred at widely varying times by Mrs. Donahue and alludes to

an unknown location in Riverside at an unknown sister of someone not specified by Mrs. Donahue. Moreover, it deals with a date at the most proximate time to January 26, 1973, of "a little bit after Christmas, but not very much after." (R.T.A. 402, lines 15-20).

On other occasions, Mrs. Donahue was even more distant, viz:

a. "Around Christmas, 1972) (R.T.A. 400, lines 11-17).

b. "Sometime around Christmas, 1972" (R.T.A. 401, lines 6-7).

c. No specific recollection at a particular time or date; no specific conversation in January, 1973. (R.T.A. 403, lines 4-8).

d. No conversation after Christmas, 1972, (R.T.A. 403, lines 14-17).

e. No specific recollection even if it was December, 1972; "I would say about from October to December."

Most importantly, the term P.C.P. was not used in this conversation. (R.T. A. 404, lines 3)

Upon redirect from prosecutor Cox, Debra Donahue admitted that "I can't really remember . . . anything that I heard after Christmas, 1972."

Hence, we take exception to the erroneous language found in the opinion People v. Mardian, 47 Cal.App.3d 16, 44 viz:

> "In addition, Debra Donahue's testimony to the effect that her ex-husband, Wyatt, and the defendant (Mardian) had in her presence discussed sales of P.C.P., which was stored at the Hardesty house, and which the defendant was to pick up, provides further independent evidence which could reasonably satisfy the jury that the accomplices were telling the truth. This testimony was likewise sufficiently corroborative to satisfy Penal Code 1111."

It is absolutely false that Debra Donahue stated that she heard a discussion of "sales of P.C.P. which was stored

at the Hardesty house," for the above quoted testimony of Debra Donahue deals with a location in Riverside and it is manifest that the illegal compound was located in the home of the Hardesty's in Glen Avon, California, a wholly different city than Riverside. Moreover, it was at least a month earlier and it was located at the home of someone's sister, which Mrs. Debra Donahue failed to define, stating she did not know where in Riverside it was located in December, 1972.

We simply bespeak of asking for intellectual accuracy on this key point, for accuracy provides absence of corroboration while inaccuracy allows the Court to state that "corroboration" did occur. We challenge anyone to cite line and page where the record shows that Debra Donahue said she heard discussions of P.C.P. sales which compound was then stored at the Hardesty home, which is manifestly in Glen Avon, California at a time fully 30 days earlier.

Intellectual and factual accuracy is

a must in the reporting of facts in a legal opinion affecting the lives and future of any California citizen.

NOTA BENE: This conversation occurred "sometime between October and December, 1972" and dealt with an unknown, uncertain home in a totally different city, Riverside, California. Moreover, it did not involve P.C.P.

It is constitutionally required per In Re Winship, 397 U.S. 358, 363 that the prosecution carries the burden of proving each and every fact necessary to prove its case against this petitioner. The High Court said :

> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedures for cogent reasons. The accused during a criminal prosecution has at stake interest of immence importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by

the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in Speiser v. Randall, supra, 357 U.S., at 525-526, 78 S.Ct. at 1342 : 'There is always in litigation a margin of error, representing error in factfinding which both parties must take into account. Where one party has at stake an interest of transcending value - as a criminal defendant his liberty - this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the

factfinder of his guilt.' To this end the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, In Re Gault and the future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967).

Moreover, the use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt

with utmost certainty.

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

This Honorable Court recently reiterated its stand In Re Winship, by its opinion Mullaney v. Wilbur, 421 U.S. 684, 94 S.Ct. 1881, 1889-1890. Stripped of its veneer the state is required to establish the corroborative facts "beyond a reasonable doubt," for the corroborative fact is a sine qua non for the conviction.

It is abundantly clear that corroborative facts raising a mere suspicion are not satisfactory and are legally inadequate.

"That more is required by way of

corroboration than mere suspicion is firmly established in the law of this state." People v. Shaw, 17 Cal.2d 778, 803; People v. Kempley, 205 Cal. 441, 456; People v. Davis, 210 Cal. 540; People v. McLean, 84 Cal. 480; People v. Hobson, 7 Cal.App.2d 392, 394; People v. Braun, 31 Cal.App.2d 593.

In People v. Reingold, 87 Cal.App.2d 382, 393, the court said:

> "We may, therefore epitomize the requirements of section 1111 of the Penal Code by saying first that the corroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplices testimony to give it value. Second, that the corroborative evidence to be sufficient and of the required substantial value must tend directly and immediately to connect the defendant with the offense charged against him; and, third, that the corroborative evidence is insufficient when it

merely casts a grave suspicion upon the accused . . ."

It seems clear that to credit the testimony of Debra Donahue with providing "corroboration" would be similar to saying that anyone that discussed some sort of "dope" being stashed anywhere would be a possible candidate for the conviction of the P.C.P. stored on January 25, 1973 in Glen Avon, Calif.

Indeed, if Mrs. X and Mr. Y were discussing that the "stuff" was stored at "his sister's home" somewhere "in Indio", where that conversation occurred say December 30, 1972, then we suppose Mr. X and Mr. Y could be convicted under the court's reasoning based on Debra's testimony "linking" them to the crime of January 25, 1973!!!

It is clear that a scholarly reading and evaluation of the correct testimony adduced by Debra Donahue inescapably leads to the conclusion that the People have in no way corroborated the crime committed on January 26, 1973, but in fact have presented evidence of a totally

different crime, if they have even done that. Even that is highly doubtful.

The California Supreme Court has said in People v. Perry, 7 Cal.3d 756, 769, 103 Cal.Rptr. 161, 449 P.2d 129:

> "To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. (People v. Luker (1965), 63 Cal.2d 646, 469, 47 Cal.Rptr. 209, 407 P.2d 9). . ."

The testimony of accomplices must be removed from the case in evaluating the sufficiency of corroborating evidence.

Several salient features of this case bear repeating:

(1) The brother-sister relationship between petitioner Wyatt and Dixie Hardesty was established only via Hardesty or others quoting her; if her testimony and others quoting her is removed from

the case, no evidence establishes any relationship between petitioner Wyatt and Hardesty.

(2) No evidence served to establish what male's "sister" was being discussed as testified to by Debra Donahue. Thus, the "sister" could have been the sister of (a) Wyatt or (b) Mardian or (c) Ken Donahue.

(3) No evidence was proffered by the state to establish that there was only one sister of this petitioner. Each and every fact necessary to the conviction must be established beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 364; Mullaney v. Wilbur, 421 U.S. 684.

Corroboration of accomplice testimony is a fact necessary to the conviction where the conviction otherwise is based on accomplice testimony.

(4) Clearly, if the testimony of accomplices, Dixie Hanson and Ken Donahue is removed from the case, what is left is testimony of Debra Donahue which sets forth a conversation between petitioner

Wyatt, codefendant Mardian and her then-husband Ken Donahue. That conversation occurred "sometime between October and December, 1972". That conversation did not concern itself with P.C.P. That conversation dealt with "dope" being located at an unknown "sister's home" at an "unknown residence" in Riverside, California, a totally different city and could not corroborate the charged crime of January 26, 1973.

All California authority deals with sufficiency of corroboration of the charged crime, not evidence of a totally separate crime.

I

CONCLUSIONS

Because of this issue of First Impression before this Honorable Court concerning Fifth and Fourteenth Amendment denial of due process by the erroneous refusal to dismiss pursuant to California Penal Code 1111-1118.1, with failure to in fact ever corroborate accomplices as to the crime in question, Certiorari should be accorded.

Respectfully submitted,

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Attorney for Petitioner
Member of the Bar
Supreme Court of the
United States

APPENDIX A

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

Court of Appeal
Fourth Dist.

FILED
June 15, 1976

Ervin J. Tuszynski,
Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
CLIFF WYATT,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Riverside County. E. Scott Dales, Judge. Judgment affirmed.

Roger S. Hanson for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jeffrey A. Joseph and Robert M. Foster, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals from a judgment of conviction of unauthorized possession of

a controlled substance for sale (commonly known as "PCP") in violation of former Health and Safety Code section 11911.[1/]

The opinion of this court in the appeal of Frank Mardian, the codefendant who was jointly tried with defendant, is set forth in People v. Mardian, 47 Cal. App.3d 16 (hg. den.).[2/] Since the preliminary hearing and all pretrial motions were jointly heard, the following statement of facts quoted from that opinion applies equally to defendant:

"On January 26, 1973, Mrs. Barbara Bockleman, a citizen informant, telephoned the Riverside County Sheriff's office and reported that she knew of the presence of contraband in a county residence. In response to Mrs. Bockleman's call, Deputy Sheriff Gerald Driscoll contacted her at her home in Norco. Mrs. Bockleman told Driscoll that a friend of

1/ Effective October 1, 1973, Health and Safety Code section 11911 was amended and renumbered section 11378.

2/ Apparently for medical reasons, pronouncement of judgment in defendant's case was deferred until July 11, 1975.

hers, Dixie Hardesty (aka Hanson) -- a woman for whom her 13-year-old daughter, Connie, sometimes babysat -- had informed her in mid-January that she (Dixie) had allowed her brother [defendant] and 'Frank' [codefendant Frank Mardian] to store a suitcase filled with narcotics and money at her home, but assured her that the suitcase had been removed. Mrs. Bockleman then told the deputy that her daughter, Connie, while babysitting at the Hardesty residence in Glen Avon the preceding day, had seen a black suitcase containing several small plastic bags filled with a white powdery substance. Mrs. Bockleman also told the officer that Connie reported that [Mardian] 'had been into the suitcase.'

"Following his interview with Mrs. Bockleman, Deputy Driscoll (accompanied by Detective Ludtke) went to the Hardesty residence in Glen Avon to talk with Connie Bockleman. Connie told the officers that she had seen a black suitcase hidden in a closet in a bedroom of the Hardesty house. She had observed the contents of the suitcase, and told the officers that it contained several small plastic bags packed with white powder. She further stated

that [Mardian] had come to the residence, 'been in the suitcase,' and had placed white powder from the suitcase into a cardboard box with which he had left. Finally, Connie said that she had asked Donny (one of Dixie's children), a seven-year-old, what was in the suitcase and that he had responded, 'there's dope . . . in the suitcase.'

"Armed with the information furnished by the Bocklemans, Deputy Driscoll filled out an affidavit for the issuance of a search warrant for the Glen Avon residence. On the evening of January 26, Driscoll presented the affidavit to a magistrate of the Riverside Municipal Court, who reviewed and discussed it with the deputy for some 30 minutes before issuing a search warrant at 10:40 p.m. The warrant authorized nighttime service (e.g., after 10 p.m.).[3/]

"Immediately upon securing the warrant Driscoll, accompanied by Detective

"[3/] The affidavit indicated that the residents of the Glen Avon home, Dixie and Joe Hardesty, would be leaving the dwelling at 6 a.m. the following morning and that this circumstance necessitated nighttime service.

Frank Andrews, proceeded to the Hardesty residence in Glen Avon. The officers served and executed the warrant at 11:25 p.m. Andrews discovered a black briefcase, with a combination lock, in a closet in the master bedroom of the house. The briefcase was seized along with some papers. Subsequent analysis of the four plastic bags of white powder secreted in the briefcase revealed that one of the bags (weighing 384 grams) contained PCP (a controlled substance), and that the other three bags contained thiodiphenylamine (a chemical similar to PCP, but one whose possession is not prohibited by Health & Saf. Code, §§ 11910 and 11911).[4/]

"Apparently Dixie and Joe Hardesty were taken into custody upon conclusion of the search, and [defendant] and [Mardian] were arrested sometime later.

"Defendant's preliminary hearing on the charge of possession, for sale, of PCP commenced on June 22, 1973.

"The People called Dixie Hardesty as

"[4/] PCP is an animal tranquilizer which when ingested or taken intravenously by humans produces hallucinogenic effects.

a witness, but she exercised her Fifth Amendment privilege against self-incrimination and refused to testify. The preliminary hearing was then continued and in the interim Mrs. Hardesty was granted immunity. She resumed the witness stand on July 27 and delivered the following testimony: In mid-January 1973, her brother [defendant], accompanied by [Mardian] brought a black briefcase to her Glen Avon residence. She, on more than one occasion, had the opportunity to view the contents of the attache case, and noted that it (at various times) contained white powder, money, and newspaper. During the two-week interim between the arrival of the briefcase at the residence and its seizure by the sheriff's deputies, [Mardian] visited the home on a dozen occasions whereupon he went directly to the satchel's hiding place. The day [defendant] and [Mardian] brought the briefcase to the house for safekeeping, it was secreted in a cubbyhole off a child's bedroom in the attic, but was subsequently moved to her bedroom closet by [defendant]. Though [Mardian] did not accompany [defendant] when he removed the stachel [sic] from

the cubbyhole he, nonetheless, on his very next visit to the Hardesty residence, went directly to its new hiding place in the master bedroom closet. (And, though [Mardian] had been at the Hardesty home a number of times, Mrs. Hardesty testified that he had never entered the master bedroom before.)

"Detectives Frank Andrews and Gerald Driscoll also testified at the hearing. Andrews related that he had found the briefcase in the bedroom closet the night the warrant was executed, and that upon finding it contained a white powdery substance, extracted a small amount of the powder and tested it with a chemical reagent to determine if it was contraband. The results of Andrews' tests led him to believe the powder was indeed contraband, and he thereupon took the briefcase into custody. Driscoll testified briefly concerning the securing of the search warrant.

"Michael White, a criminalist, testified that the four bags of powder found in the briefcase were analyzed in his Riverside lab on January 30, 1973. Three of the plastic bags contained a white powder, the fourth, yellow. One of the

white powders, and the yellow, were subjected to a series of chemical tests. PCP was found to be present in both powders. White testified that the chemical analysis was made on a one milligram sample of each of the powders, but that no quantitative analysis was made as to the percentage concentration of PCP that was present in the compounds[5/] though White was able to say that he doubted his chemical tests would have revealed the presence of PCP in the compounds if its percentage concentration was less than 1 percent.

"Upon conclusion of the hearing, defendant was held to answer for violation of Health and Safety Code section 11910, possession of a controlled substance. [Thereafter, the district attorney filed an information charging defendant with possession of a controlled substance for sale in violation of Health and Safety

"5/] Subsequent chemical analysis was had of these two bags and only one (the off-white) was determined to contain the controlled substance PCP. Expert testimony regarding these subsequent tests was delivered at trial.

Code section 11911.]

"After defendant's motion to set aside the information was denied (December 7, 1973), he moved the court to suppress the evidence seized pursuant to the search warrant. A hearing on the motion was held March 14. At this hearing, Mrs. Bockleman testified regarding her report to and interview with Riverside County Sheriff's deputies. Detective Driscoll testified regarding his investigation and execution of the affidavit supporting the search warrant for the Hardesty residence. And Dixie Hardesty delivered substantially the same testimony she had at the preliminary hearing some months before.

"In addition, Connie Bockleman testified as to what she had observed concerning the black briefcase in late January 1973. As noted previously, Connie (on January 26) told Officer Driscoll that she had seen a black attache case filled with plastic bags of white powder and some newspaper. In addition, she told the officer that while seated on horseback some 15 feet from the door of the house she had seen [Mardian] leave the residence with a lidless cardboard box

under his arm. Connie testified that while she did not see any plastic bags in the box, she thought she saw white powder in it similar to that which she had seen in the briefcase earlier that same day.

"After hearing the testimony, the court denied defendant's motion to suppress and the case proceeded to trial on April 8, 1974. During the course of the trial, Detectives Driscoll and Andrews, Connie and Mrs. Bockleman, and Dixie Hardesty all testified substantially as they had on previous occasions. In addition, the following relevant testimony was produced at trial.

"Constance Kehn, a neighbor of Dixie Hardesty, stated that some two to four weeks prior to the January 26 search of the Hardesty home she had seen at least one of the codefendants (whom she subsequently identified as Frank Mardian) bring a black attaché case to the house. She further testified that both defendant and [Mardian] had been frequent visitors to the residence in early 1973.

"Kenneth Donahue, who was acquainted with both defendant and [Mardian],

testified that he accompanied [defendant] to the Hardesty house during January 1973 when [defendant] 'picked up a couple of ounces of PCP.' Donahue stated that [defendant] had taken him to the house to show him where the PCP 'stash' was located because [defendant's] partner, Mardian, was having trouble with his heroin habit and [defendant] wanted Donahue to replace Mardian in his PCP sales operation. (This tesimony [sic] regarding Mardian was subsequently stricken on [his] motion.) Donahue further testified that he and [defendant] delivered some of the PCP they picked up at the Hardesty house to a party in Yorba Linda, and that he (Donahue) took a portion of the contraband home with him that evening.

"Debra Donahue, Kenneth's ex-wife, also testified on behalf of the prosecution. She stated (over defense objection) that in December 1972 or early January 1973 she was privy to a number of conversations between her ex-husband, [defendant] and [Mardian], wherein the three discussed 'different types of dope.' During these discussions she testified

that the parties suggested that 'they had to go to Riverside to get it [the "dope"]' and that [defendant] 'would send Frank [Mardian] to get it' at [defendant's] sister's house.

"Deputy Sheriff Harry Lesseos)of Los Angeles County) was called by the district attorney as an expert in the sale of PCP. Lesseos testified that PCP is a very strong drug, which can have hallucinogenic effects on humans (similar to LSD) when taken in very minute doses. He further stated that the average amount of pure PCP normally ingested to achieve a 'high' was ten micrograms, and that if injected intravenously, a user could obtain the desired results with as little as two or three micrograms."

Following a 14-day trial, the jury returned a verdict finding defendant guilty of violation of section 11911 (possession of PCP for sale) of the Health and Safety Code.[6/]

On appeal, defendant contends: (1) The affidavit upon which the issuance of

6/ Codefendant Mardian was found guilty of possession.

the search warrant was based was constitutionally deficient; (2) the trial court erred in refusing to allow the defense to question a prosecution witness as to his current address; (3) his Sixth Amendment right of confrontation was denied by the allowance of testimony about conversations between Ken Donahue, Mardian and defendant, since Mardian did not testify at trial; (4) his motion for judgment of acquittal was erroneously denied since the prosecution failed to present adequate corroboration of the testimony of accomplice witnesses; and (5) his conviction of possession for sale must be reversed because it is inconsistent with his codefendant's conviction of simple possession.

I

Defendant's first two contentions (concerning the adequacy of the affidavit upon which the search warrant was based and his right to inquire as to the address of a prosecution witness) have already been fully considered by this court in People v. Mardian, supra, 47 Cal.App.3d 16, 30-34, 40-41. Since defendant's contentions are identical to those rejected by this court

in his codefendant's appeal and there has been no intervening change in the law, no purpose would be served by further discussion of those issues in this opinion. (See People v. Watters, 246 Cal.App.2d 154, 158.)

In People v. Mardian, supra, 47 Cal. App.3d 16, we also rejected codefendant Mardian's argument that his constitutional right of confrontation was denied by the admittance into evidence of defendant's out-of-court admissions. Defendant now argues that his confrontation right was impinged upon by testimony as to Mardian's extra-judicial statements. Defendant's argument, like that made in Mardian's appeal, relates to Debra Donahue's testimony concerning conversations she overheard between her ex-husband (Kenneth Donahue), defendant and Mardian. It is not entirely clear that the conversations in question included any admissions by Mardian prejudicial to defendant; the crucial admission appears to have been made by defendant. In any event, assuming that any statements referred to by Debra Donahue were attributable to Mardian,

our discussion concerning the admissibility of the admission, as opposed to the full confession, of a codefendant in People v. Mardian, supra, 47 Cal.App.3d at pages 41-42, is equally applicable here. The trial court did not err in admitting testimony as to the conversations in question.

II

Defendant contends that his motion for judgment of acquittal was erroneously denied since the prosecution failed to present adequate corroboration of the testimony of Dixie Hardesty and Kenneth Donahue, both of whom the trial court determined to be accomplices as a matter of law.

As we pointed out in People v. Mardian, supra, 47 Cal.App.3d at page 44, Debra's testimony to the effect that Kenneth Donahue, Mardian, and defendant had in her presence discussed sales of PCP, which was stored at the Hardesty house and which Mardian was to pick up, provides independent evidence which could reasonably satisfy the jury that the accomplices were telling the truth.

Defendant insists that Debra's testimony related only to events which occurred between October and December 1972 and that such testimony is not relevant to establishing the commission of the crime "on or about January 26, 1973" as charged in the information. However, Debra indicated she had heard such a conversation on more than one occasion "both before and possibly a little bit after" Christmas 1972, but not after the middle of January 1973. While Debra exhibited uncertainty about the specific dates of the conversations, her uncertainty did not destroy the materiality of her testimony. Her testimony, standing alone, reasonably tends to connect defendant with the possession of PCP on January 26, 1973. (See People v. Perry, 7 Cal.3d 756, 769.) It therefore constitutes adequate corroboration. (People v. Mardian, supra, 47 Cal.App.3d 16, 42-43.)

Defendant strenuously maintains, however, that Debra's testimony may not be considered in determining whether the accomplices' testimony was sufficiently corroborated. He bases his contention on the fact that Debra's testimony had not yet

been offered at the time the prosecution initially rested its case and defendant's motion for judgment of acquittal was made and denied. After the denial of the motion, the trial court allowed the prosecution to reopen its case in order to present Debra's testimony. Defendant insists that since no corroboration of the accomplices' testimony implicating him in the crime existed at the time he moved for acquittal, the prosecution was precluded from thereafter reopening its case. We do not agree.

Penal Code section 1118.1 provides in pertinent part:

"In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

In People v. Valerio, 13 Cal.App.3d 912 912, 919-921, a motion under section 1118.1 was heard after all the evidence of both prosecution and defense was in but the motion had been previously reserved and by permission of the trial court was deemed made at the close of the prosecution's case. In reviewing the denial of the motion, we considered only the evidence as it existed at the close of the prosecution's case. Defendant seizes upon Valerio and the reference in section 1118.1 to "the evidence then before the court" to argue that on review of the denial of the motion in the instant case we may consider only the evidence which had been presented by the prosecution up to the time the motion was made. We disagree.

The phrase "the evidence then before the court" in section 1118.1 simply refers to the evidence existing "at the close of the evidence on either side," regardless of the order of proof. While Debra's testimony was presented after the prosecution initially rested and defendant had moved for acquittal, trial courts have discretion to permit a case to be reopened

for further testimony. (People v. Kohn, 258 Cal.App.2d 368, 377; People v. Pompa, 178 Cal.App.2d 62, 66.) The trial court did not abuse its discretion in permitting the prosecution, after it initially rested but before the defense commenced, to reopen its case and to defer ruling on the motion for acquittal until after the additional evidence was taken.[7/] People v. Hamil, 73 Cal.App. 649, 653-654.)

7/ Defendant relatedly contends that it was error to allow the introduction of the testimony of accomplices prior to the testimony of other witnesses. He suggests that this court decree a new procedural rule requiring trial courts to determine whether corroborative testimony adequately links a defendant to the crimes charged after the presentation of the proffered corroboration, and before the introduction of any accomplice testimony. The apparent basis for defendant's proposal is the asserted inability of trial courts to objectively determine the sufficiency of the corroboration after having heard incriminating testimony offered by an accomplice. While a trial judge, like a juror, may have difficulty in restricting his consideration of improper evidence in making factual determinations (see People v. Massie, 66 Cal.2d 899, 923; People v. Charles, 66 Cal.2d 330, 338, fn. 12), no such problem exists in the determination of a question of law.

(continued)

III

Defendant contends that his conviction of possession of PCP for sale must be reversed since it is inconsistent with his codefendant's conviction of mere possession.

The evidence is sufficient to sustain defendant's conviction of possession for sale (see People v. Mardian, supra, 47 Cal.App.3d 16, 45, fn. 19), and he may not complain that the jury was more charitable to his codefendant. "Where the evidence warrants the jury holding the perpetrator of the [crime] guilty . . . neither he nor his accomplice may complain about an inconsistent verdict convicting the accomplice of a lesser offense." (People v. Ferrel, 25 Cal.App.3d 980, 875, citing People v. Finch, 213 Cal.App.2d 752, 777.)

7/ (continued)
Moreover, the order of proof may not be thought to contribute to any confusion among the jurors in distinguishing between accomplice testimony and corroboration thereof. Regardless of the order of the witnesses, no questions are presented to the jury for determination until all the evidence is in.

Judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

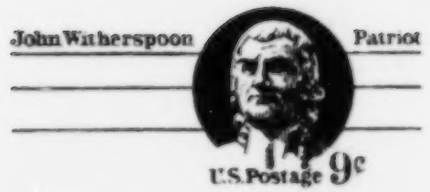
Tamura
J.

We concur:

Gardner
P.J.

Kaufman
J.

APPENDIX B



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I have this day filed Order

HEARING DENIED

In re: 4 Crim. *No.* 7527
People

vs.
Wyatt

Respectfully,

G. E. BISHEL
Clerk

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